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No. 05-908

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

PARENTS INVOLVED IN COMMUNITY SCHOOLS,

Petitioner,

v.

SEATTLE SCHOOL DISTRICT NO. 1, *et al.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR RESPONDENTS

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QUESTIONS PRESENTED

(1) Should Petitioner's claims be dismissed for lack of Article III and associational standing because none of its members imminently face an actual—*i.e.*, non-speculative—harm.

(2) Did the Seattle School District's limited consideration of race in its high school student assignment plan comply with the Equal Protection Clause of the Fourteenth Amendment because:

(a) the District had compelling government interests in promoting the educational benefits of diverse public high school enrollments, alleviating the potential harms of racial isolation, and ensuring equitable access for minority students to the District's most popular high schools, and

(b) the limited consideration of race in the District's student assignment plan was narrowly tailored to serve these compelling interests while promoting the race-neutral educational values of parental choice, neighborhood schools, and keeping families together.

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STATEMENT OF THE CASE

This case involves a multi-factor, "Open Choice" assignment plan last used in 2001-02 to determine to which of Seattle's[1] ten public high schools entering ninth graders would be assigned. Choice was the most important factor under the plan: students submitted their choices in order of preference and assignments were made on that basis so long as seats were available in a school. This case arose because more students wanted to attend some schools than those schools could accommodate. In assigning students to these over-subscribed schools, the District's plan took into account a number of non-racial factors, in addition to choice, including keeping siblings in the same school, and allowing children to attend schools close to their homes. In limited circumstances, the plan also used race as a factor.

The Board determined that consideration of race was necessary because of Seattle's highly diverse population and its racially segregated housing patterns, which have persisted for many years.[2] While the plan was in effect, the District was responsible for educating approximately 46,000 students, about 60% of whom were non-white (Asian, African-American, Hispanic, or Native American). JA 37, 82, 128, 308-09. Housing patterns in Seattle are starkly divided along a north-south line: more than 75% of the District's non-white students live in the southern half of the city, while 67% of white students live in the northern half. JA 171, 175. In the

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[1] Respondents are Seattle School District No. 1 ("the District"), its elected board of directors ("the Board") and an appointed superintendent.

[2] Restrictive covenants and "private codes" between landlords and realtors prohibiting sale or rental to minorities outside of certain neighborhoods were common in Seattle through the 1940's, and continued informally even after this Court's decision in *Shelley* v. *Kraemer*, 334 U.S. 1 (1948). Quintard Taylor, *The Forging of a Black Community—Seattle's Central District from 1870 through the Civil Rights Era* 82-87, 115-16, 178 (Univ. of Wash. Press 1994).

southern half of the city, 24 of 36 neighborhoods surrounding the District's elementary schools had populations that were more than 70% non-white and nine had populations that were 90% non-white. In the northern half of the city, only two of 25 elementary school neighborhoods, clustered close together near the city limits, had student populations exceeding 50% non-white.[3] These conditions have resulted in varying levels of racial segregation in Seattle schools.

The Board knew that if high school assignments were determined only by choice, the presence of a sibling previously enrolled, and proximity, the diversity of the city's schools (which had been achieved over the course of more than 30 years of school integration efforts) would have been materially reduced, there would have been limited opportunities to opt out of racially isolated schools, and the three over-subscribed high schools in north Seattle would have been inaccessible to the 75% of non-white students who resided in south Seattle. The Board, accordingly, included a limited consideration of race in its assignment plan to avoid these foreseeable results while providing every student with the opportunity to attend at least one of the District's over-subscribed high schools.

I. BACKGROUND

A. History of Integration Efforts in Seattle

The assignment plan at issue was preceded by over 30 years of efforts by the District to avoid racial isolation and promote integration in its schools. These measures provide important context for both the Board's decision-making and the Court's review.

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[3] These conditions are illustrated on the map included in the Joint Appendix ("JA") at 44-45. Other references to the record, used herein, are: "Pet. App. __" (appendix to the petition for certiorari); "ER__" (court of appeals excerpt of record); and "SER __" (supplemental excerpt of record).

1. Early Plans (1963-76)

The District's initial integration efforts during the 1960's were directed at a highly segregated high school population.[4] In 1963, the Board adopted a voluntary transfer program. SER 284-88. In 1965, it added a mandatory elementary school transfer program and, later, a mandatory middle school transfer program. SER 288-93. These early voluntary plans were upheld against a number of legal challenges in state court.[5]

2. The Seattle Plan (1977-88)

The District's initial integration measures, however, were unsuccessful. SER 344. Numerous civil actions and administrative complaints alleged that the District had unlawfully segregated its schools. *See Seattle School Dist. No. 1* v. *Washington*, 473 F. Supp. 996, 1055-56 (W.D. Wash. 1979) (describing these actions), *aff'd*, 633 F.2d 1338 (9th Cir. 1980), *aff'd*, 458 U.S. 457 (1982). In response, the Board in 1977 adopted a large-scale mandatory assignment plan (the "Seattle Plan") to integrate Seattle's schools by the fall of 1979. SER 307.[6]

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[4] In 1962, Garfield High School, located in central Seattle, enrolled 75% of the city's African American high school students. SER 284. In north Seattle, no high school enrolled more than 3% non-white students. For example, Ballard High School, with an enrollment of almost 2500 students at that time, had 15 non-white students. SER 335.

[5] *See State ex rel. Citizens Against Mandatory Bussing* v. *Brooks*, 492 P.2d 536, 541 (Wash. 1972) (authority to integrate schools did not depend on the existence of *de jure* segregation), *overruled in part on other grounds by Cole* v. *Webster*, 692 P.2d 799 (Wash. 1984); *Citizens Against Mandatory Bussing* v. *Palmason*, 495 P.2d 657, 661 (Wash. 1972) (Wash. Const. art. 9 § 1 provided authority to integrate schools to create equal educational opportunity).

[6] The Board's reasons for adopting the Seattle Plan were:

> [to] ward off threatened litigation, * * * to prevent the threatened loss of federal funds, * * * and the [Board's] perception that racial balance in the schools promotes the attainment of equal educational

To address the problems largely created by Seattle's segregated housing patterns, the plan created attendance zones, mostly drawn along north-south lines, and required busing to integrate the District's schools. For example, the predominantly white Ballard, Ingraham, and Queen Anne neighborhoods in north Seattle were combined with the predominantly non-white Franklin area in a single attendance zone. SER 307. After the Seattle Plan was in place, the lawsuits and administrative complaints against the District were resolved and the federal government contributed funds to establish a Desegregation Planning Office to further the Board's integration efforts. SER 344.

A state initiative banning the Seattle Plan was passed in 1978. The District's challenge to that measure culminated in this Court's decision in *Washington* v. *Seattle Sch. Dist. No. 1*, 458 U.S. 457 (1982), which held that the initiative violated the Equal Protection Clause, and allowed the plan to remain in effect. Although this Court did not "specifically pass on" "the propriety of race-conscious student assignments for the purpose of achieving integration * * * absent a finding of prior *de jure* segregation," *id.* at 472 n.15, it held that the state law was unconstitutional because it "removes the authority to address a racial problem—and only a racial problem—from the existing decision-making body, in such a way as to burden minority interests. Those favoring the elimination of *de facto* school segregation now must seek relief from the state legislature, or from the statewide electorate." *Id.* at 474.

3. Controlled Choice Plans (1988-98)

The Seattle Plan largely met its stated integration goals. SER 311-12, which were to achieve a student enrollment at

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opportunity and is beneficial in the preparation of all students for democratic citizenship regardless of their race. [*Seattle Sch. Dist. No. 1*, 473 F. Supp. at 1007].

each school with a racial composition that was within a reasonable range of the district-wide average.[7]

Nevertheless, to reduce the plan's mandatory features and control costs, in 1988, the Board adopted a less intrusive plan, known as Controlled Choice. Pet. App. 7a. Under Controlled Choice, predominantly white north Seattle neighborhoods were clustered with predominantly non-white south and central neighborhoods. Families could choose from two or more schools located within the cluster in which they lived. JA 81, SER 376.[8]

II. THE OPEN CHOICE PLAN (1999-2002)

In the mid-1990's, the Board again considered multiple options for a new assignment plan. SER 33-35. It conducted an extensive study, including public forums and focus groups, and adopted five "guiding principles" to be applied in development of a new assignment plan: 1) enable children to attend school close to home; 2) provide equal access to quality programs; 3) increase the percentage of families assigned to their first choice school; 4) maximize diversity within each school; and 5) minimize mandatory assignments based on race. JA 84. The Board recognized that each of these principles could not be fully achieved in a single plan and that "the demographics and racial composition of the district make it difficult to maximize diversity in the schools while at the same time eliminating mandatory assignments and allowing families to choose neighborhood or regional schools." *Id.*

In 1996, the Board adopted the "Open Choice" plan for elementary schools beginning in the 1998-99 school year and

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[7] Using a range of plus-or-minus 10 to 20 percentage points as a target was (and continues to be) the approach customarily used by federal courts in desegregation cases. SER 408, 446.

[8] The two high schools available to students from the Queen Anne and Magnolia areas were Ingraham and Franklin. SER 376.

expanding to secondary schools in 1999-2000. JA 84. The Open Choice plan did away with attendance zones for high schools and racial targets or lids on enrollment and, at the high school level, allowed families to request assignments to any school within the city. School choices were to be listed in rank order with no limit on the number of choices. ER 621.

At that time, the District was operating 10 comprehensive high schools. Each offered a similar array of educational and extracurricular programs, and each received per-pupil funding pursuant to the same formula. SER 90-102. Five schools (Ballard, Franklin, Garfield, Hale, and Roosevelt) were over-subscribed. Pet App. 9a-10a. Three of these five schools (Ballard, Hale, and Roosevelt) are located in predominantly white north Seattle; one (Garfield) is centrally located and therefore drew from a racially diverse set of neighborhoods; and the fifth (Franklin) is located in south Seattle, where the neighborhoods are predominantly minority. JA 38-39.

The Open Choice plan used a series of tiebreakers to determine assignments to over-subscribed schools. At the high school level, the first tiebreaker was whether the student had a sibling already assigned to the school. JA 101. The second tiebreaker was proximity of the student's residence to the school. JA 38, 101-03. The proximity tiebreaker was subject, at some over-subscribed schools, to an "integration tiebreaker." For the 1999-2000 school year, the integration tiebreaker applied to over-subscribed schools with enrollments deviating more than 10 percentage points from the overall district-wide racial composition. The integration tiebreaker accordingly applied in that year to four over-subscribed high schools: Ballard, Hale, and Roosevelt as to non-white students and Franklin as to white students. JA 37-39. Students who did not choose a school were assigned to the closest school with space available. ER 638.

Assignments could be appealed and the tiebreakers overridden based on a misapplication of the rules or procedures, psychological hardship, or medical needs. ER 135, 624-25. The appeal process provided for review by an independent hearing officer and a subsequent review by an appeal panel. *Id.*

A. Initial Implementation (1999-2000)

Implementation of Open Choice at the high school level became controversial in 1999-2000 because of the extreme popularity of Ballard and Hale high schools. These schools had not historically been over-subscribed and their enrollments in the recent past had become predominantly non-white, despite their location in mostly white neighborhoods. Pet. App. 9a-10a. With the opening of a new building at Ballard and innovative new academic programs at both schools, enrollments swung back to predominantly white, triggering use of the integration tiebreaker. *Id.*

As a result of the popularity of these schools, some white families, particularly in the Queen Anne and Magnolia neighborhoods of northwest Seattle, were unable to attend Ballard, Hale, or the third over-subscribed north Seattle high school, Roosevelt. The integration tiebreaker, however, did provide these families the option of choosing to attend Franklin High School. Franklin was a "very impressive" school, ER 452, and of like quality to the other over-subscribed schools. JA 151; Pet. Br. 4.

B. 1999 Board Review

The Board reviewed the assignment plan at least annually. JA 90, 113, 137. After one year's experience with the Open Choice plan, the Board debated whether to continue to use the integration tiebreaker. JA 113-28. Board members recognized that steps were necessary to increase the attractiveness of the under-subscribed schools. *Id.* Until that happened, a choice system with a proximity tiebreaker would

not provide non-white students a fair chance to attend the popular schools in mostly white north Seattle. *Id.* Accordingly, the Board decided to continue to use the integration tiebreaker for the 2000-01 school year. JA 128.

In so doing, the Board adopted a "Statement Reaffirming Diversity Rationale," in which it detailed its reasons for using the integration tiebreaker. JA 128-30. First, the Board found value in racially diverse schools: it explained that a diverse student enrollment "fosters racial and cultural understanding" by "increas[ing] the likelihood that students will discuss racial or ethnic issues and be more likely to socialize with people of different races." JA 128-29. Diversity "enhances the educational process" by "bring[ing] different viewpoints and experiences to [the] classroom" and "has inherent educational value from the standpoint of education's role in a democratic society." JA 129. Diversity is therefore "a valuable resource for teaching students to become citizens in a multi-racial/multi-ethnic world." *Id.*

Second, the Board sought to avoid racially isolated schools, stating its commitment "that no student should be required to attend a racially concentrated school." JA 130. The Board was aware that predominantly non-white schools in south Seattle would become more racially isolated with the use of a proximity tiebreaker. The Board sought to provide students living in those areas an opportunity to attend a more diverse school if they chose to do so. JA 115, SER 117-19.

Third, the Board was concerned that giving an unqualified priority to students living closest to the over-subscribed schools would deny the vast majority of non-white students an opportunity to attend these schools. JA 115-30.

C. The Effect in the 2000-01 School Year

The integration tiebreaker initially determined the assignments for approximately 300 of 3,000 incoming ninth

graders for the 2000-01 school year.[9] Pet. App. 12a. After application of the various tiebreakers, 80.3% of entering ninth graders in 2000-01 were assigned to their first choice school. JA 41-42. If the integration tiebreaker had not been in effect, the percentage of ninth graders receiving their first choice of schools would have increased by only a tenth of a percentage point, to 80.4%. *Id.* Most of those not receiving a first choice assignment were able to attend their second or third choice school. JA 42. Thus, the plan's primary goal of providing parental choice was largely met and the integration tiebreaker only minimally affected achievement of that goal.

The integration tiebreaker did have a significantly positive effect on the District's other goals, however. The tiebreaker led to assignment of 89 more white students to Franklin than would otherwise have been assigned there. After the tiebreaker, 107 more non-white students were assigned to Ballard, 27 more non-whites to Hale, and 82 more non-whites to Roosevelt. JA 39-40. As a result, the composition of the entering class at each of the four over-subscribed schools was more than 10 percentage points closer to the racial make-up of the District as a whole than would have occurred without the tiebreaker.

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[9] The record in this case concerning the effect of the integration tiebreaker on high school enrollments is largely limited to the 2000-01 school year. This litigation was commenced in July 2000, after assignments had been made for the 2000-01 school year, and the record was closed in March 2001, prior to assignments for the 2001-02 year. JA 19, 25. The Open Choice plan was applied to high schools for the first time in 1999-2000. JA 94. Only limited data about the impact of the tiebreaker in that year is included in the record. JA 310.

School	9th Grade Class % Non-White **With** Integration Tiebreaker	9th Grade Class % Non-White **Without** Integration Tiebreaker
Franklin	59.5	79.2
Hale	40.6	30.5
Ballard	54.2	33.0
Roosevelt	55.3	41.1

Id.

More than half of the non-white students who gained access through the integration tiebreaker to north end schools resided in predominantly non-white neighborhoods in the Central Area or south Seattle. JA 41. Without the integration tiebreaker, none of those students would have been able to attend the popular north Seattle schools. *Id.*

D. 2000 Board Review

In fall 2000, the Board made several adjustments for the 2001-02 school year, the most recent year in which the plan was applied. JA 137-38. First, it determined that the integration tiebreaker should only apply when a school deviated by more than 15 percentage points from the overall racial composition of the District.[10] JA 38, 137. As a result, for the 2001-02 school year, the integration tiebreaker no longer applied to Roosevelt but continued to apply to Ballard, Franklin, and Hale. JA 39, 163. The Board also determined that the integration tiebreaker should not apply to grades 10 through 12, because, while only a few assignments were made to the upper grades using tiebreakers, where the

[10] The Board rejected a recommendation by the then-superintendent to adopt a 20 percentage point deviation as the standard for determining the schools to which the integration tiebreaker would apply, JA 137, because that standard would have left Ballard alone among high schools subject to the integration tiebreaker, severely restricting options for non-white students, and eliminating an option for whites. JA 308-09, SER 416.

integration tiebreaker applied, it could determine all of these assignments. JA 137; SER 434, 444. The Board additionally decided that the integration tiebreaker would no longer apply if a school's racial composition came within the broad 30 percentage point range during the assignment process. JA 137-38. Once that occurred, remaining assignments would be determined by the other tiebreakers. SER 434, 444. Finally, the Board directed the superintendent to focus on making improvements in quality at all high schools, particularly those that were under-subscribed. JA 138; ER 407-08.

III. PROCEEDINGS BELOW

Petitioner's[11] recitation of the proceedings below omits some important points. In July 2000, Petitioner filed suit seeking only declaratory and injunctive relief. The complaint contained no request for damages or for changes to existing assignments. JA 28. PICS presented the cases of two of its members in the district court. Both were white residents of the Queen Anne or Magnolia neighborhoods, who listed as their choices for the 2000-01 school year only the three over-subscribed high schools in predominantly white neighborhoods, Ballard, Roosevelt, and Hale. ER 464-66. Each failed to receive their first choice, Ballard, because of the integration tiebreaker. JA 44, 164. They were not enrolled in their second or third choice of schools because of the proximity tiebreaker. *See* JA 164, 173, 175.

After the parties agreed that no trial was necessary, the district court considered an extensive record on cross motions for summary judgment, rejected Petitioner's state law claim, and held that the integration tiebreaker was narrowly tailored

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[11] In 2000, Parents Involved in Community Schools (hereinafter "Petitioner" or "PICS") reported a membership of fewer than 50 individuals, who were parents of children enrolled or who wished to enroll in Seattle's public schools. ER 456; SER 391, 395.

to serve the Board's compelling interests in addressing *de facto* segregation, avoiding racial isolation, and achieving the educational benefits of a racially diverse high school student body. Pet. App. 269a.[12]

In June 2003, when the Washington Supreme Court addressed the statutory question posed by the first Ninth Circuit panel, it held that the Open Choice plan complied with state law because it did not "discriminate against, or grant preferential treatment to, any individual or group on the basis of race." *Parents Involved in Cmty. Schs.* v. *Seattle Sch. Dist. No. 1*, 72 P.3d 151, 166 (Wash. 2003). While the state court declined to answer the Ninth Circuit's inquiry as to whether the Washington Constitution required racially integrated public schools, it "note[d] that article IX [of the Washington Constitution] imposes on the State the mandatory and paramount duty to provide an education that prepares students for citizenship. This may require positive steps to provide a diverse, culturally rich and racially integrated educational experience." *Id.* at 166. The state's highest court also concluded that "[t]o the extent the tiebreaker is race conscious, it furthers a core mission of public education" under the Washington Constitution: "to make available an equal, uniform and enriching educational environment to all students within the district." *Id.*

By the time of the Ninth Circuit's *en banc* ruling, in October of 2005, all of the students identified by Petitioner during discovery had either graduated from high school or had received a school assignment in the absence of the integration tiebreaker. In August 2006, Petitioner lodged an affidavit with the Court identifying additional children of its members. None of these students assert an intention to apply

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[12] In light of changes to the plan for 2001-02, PICS also sought a declaratory judgment that the earlier version of the plan was unconstitutional. The district court declined to issue such a ruling on standing grounds. Pet. App. 301a.

to any particular Seattle high school, or indeed, any Seattle high school at all, nor are any of these students eligible to apply to high school now.

SUMMARY OF ARGUMENT

There is no case or controversy properly before the Court. All of the students who previously challenged Seattle's race-conscious high school student assignment plan, last used in making assignments for the 2001-02 school year, have graduated. No current high school students have been assigned pursuant to such a plan. Petitioner's new members, who have not yet applied to high school, lack standing to pursue prospective injunctive relief because their claims are entirely speculative.

Nevertheless, the race-conscious high school student assignment plan last used by the District five years ago was constitutional under the Court's most rigorous standard. The plan was narrowly tailored to achieve three distinct, but related, compelling interests in (1) promoting the educational benefits of diverse enrollments, (2) alleviating the potential harms of racial isolation, and (3) providing equitable access to Seattle's most popular public high schools.

The compelling nature of these interests is underscored by this Court's school desegregation cases, as well the recent decisions in *Grutter* v. *Bollinger*, 539 U.S. 306 (2003), and *Gratz* v. *Bollinger*, 539 U.S. 244 (2003). In the course of its herculean efforts over the last half-century to eliminate segregation in this Nation's public schools, this Court has repeatedly emphasized both the central responsibility of public schools in our diverse democratic society for inculcating essential civic values, including mutual respect and tolerance, and the long-standing and vital tradition of local control over public education. As a result, in many cases, the Court has either directly stated or assumed that school districts may voluntarily take steps to promote racially integrated schools. The Court's recognition of a compelling

interest in diversity in the context of higher education supports the compelling nature of the interests at stake here. These interests are broader, deeper, and stronger in the context of public elementary and secondary schools because public schools serve a larger number of students at an impressionable age and because of the special role public schools play in our democracy.

Petitioner's arguments to the contrary rest on the false assumption that a desire to integrate public schools is constitutionally indistinguishable from the intent to segregate them. They are not equivalent, however, as many of the Court's most important decisions of the latter half of the Twentieth Century make clear.

Seattle has intentionally promoted integrated public schools. Yet, in response to the Court's precedents in other areas strictly limiting the use of racial classifications, the District's consideration of race in student assignment has been increasingly limited over time. The last race-conscious plan implemented by the District over five years ago was put in place only after race-neutral alternatives were considered; used race only in a few schools and in conjunction with a number of other factors; had an appeal process for special circumstances; did not impose any undue burdens; and was both self-limiting in its operation and frequently reevaluated by the Board. The plan not only promoted the District's compelling race-related interests, but also fostered other important educational goals, including parental choice and opportunities to attend neighborhood schools.

Petitioner's argument that the plan was not narrowly tailored ignores this Court's recent admonition that in the application of strict scrutiny, "[c]ontext matters." *Grutter*, 539 U.S. at 327. Because Seattle's student assignment plan did not involve any merit-based determination, it is inappropriate to demand, as Petitioner suggests, that the plan include the type of "holistic review" of individual students

that is necessary in the context of selective higher education admissions processes. In the context of non-selective public school assignment, Seattle's 2001-02 plan was narrowly tailored to the District's compelling interests.

ARGUMENT

I. AN ACTUAL CASE OR CONTROVERSY NO LONGER EXISTS.

Under Article III, § 2 of the Constitution, a "case" or "controversy" must exist at all stages of review. *Arizonans for Official English* v. *Arizona*, 520 U.S. 43, 67 (1997). Therefore, before reaching the merits of Petitioner's challenge, the Court "must consider whether [PICS] has standing to seek forward-looking relief." *Adarand Constructors, Inc.* v. *Pena*, 515 U.S. 200, 210 (1995).

The "irreducible constitutional minimum of standing contains three elements." *Lujan* v. *Defenders of Wildlife*, 504 U.S. 555, 560 (1992). First, the plaintiff must demonstrate a concrete " 'injury in fact' " that is " 'actual or imminent, not 'conjectural' or 'hypothetical.' " *Id.* (citations omitted). Second, there must be a traceable "causal connection between the injury" and the complained-of-conduct, and third, "it must be 'likely,' as opposed to merely 'speculative' that the injury will be 'redressed by a favorable decision.' " *Id.* at 560-61 (citations omitted). " 'Past exposure to [allegedly] illegal conduct' " cannot support a claim for prospective relief. *City of Los Angeles* v. *Lyons*, 461 U.S. 95, 102 (1983) (quoting *O'Shea* v. *Littleton*, 414 U.S. 488, 495-496 (1974)). Rather, " 'continuing, present adverse effects' " must be shown. *Id.*

For an association like PICS, which is not itself the object of the challenged government action, standing is " 'substantially more difficult' to establish." *Lujan*, 504 U.S. at 562 (quoting *Allen* v. *Wright*, 468 U.S. 737, 758 (1984)). An association has standing to bring suit on behalf of its

members only if "its members would otherwise have standing to sue in their own right." *Hunt* v. *Washington State Apple Adver. Comm'n,* 432 U.S. 333, 343 (1977). Accordingly, an association "must allege that its members, or any one of them, are suffering immediate or threatened injury as a result of the challenged action of the sort that would make out a justiciable case had the members themselves brought suit." *Warth* v. *Seldin,* 422 U.S. 490, 511 (1975). Where an association fails to identify a single member who faces "immediate or threatened injury" and who would currently have standing if he or she had brought the case directly, the organization lacks standing. *See Lujan*, 504 U.S. at 563.

When it was last used five years ago, the integration tiebreaker applied at the ninth grade level only. The youngest child of a PICS member identified in the record below entered high school after this case was submitted to the *en banc* Court of Appeals. JA 299-301; ER 278; SER 69-70. Accordingly, PICS cannot rely on these individuals to establish its standing to seek prospective relief at this stage in the case. *Lyons*, 461 U.S. at 102. It asserts, however, that there are "other members of [PICS] with young children currently in Seattle public schools who will likely be affected by the District's race preferences when applying for high school admission," and requested permission to lodge an affidavit identifying these members. Pet. Br. 10 n.5.

Petitioner's affidavit does not cure the jurisdictional problem; it only highlights the lack of standing. Whether any of the children Petitioner now identifies could someday show a likelihood of actual and imminent harm is contingent on at least the following: (1) the Board must retain an open choice plan for students entering ninth grade; (2) the Board must reinstitute the integration tiebreaker; (3) the family must choose to enroll a child in a Seattle public high school; (4) the child's school of choice must be over-subscribed; (5) the child's school of choice must be subject to a hypothetical

integration tiebreaker or other race-conscious measure; and (6) any assignment will not be resolved through factors that do not take account of race, such as sibling enrollment or distance.[13]

Compounding the speculative nature of any future impact is the passage of time and unknowable changes in conditions before any of the children identified in the affidavit can enroll in high school. Injury in fact requires a "showing that sometime in the relatively near future" the alleged injury will occur. *Adarand*, 515 U.S. at 211; *see also Whitmore* v. *Arkansas*, 495 U.S. 149, 158 (1990) (alleged injury must be "certainly impending" to constitute an injury in fact) (citation omitted); *McConnell* v. *Federal Election Comm'n*, 540 U.S. 93, 226 (2003) (alleged injury must not be "too remote temporally to satisfy Article III standing"). "[U]nadorned speculation will not suffice" to grant an association standing. *Simon* v. *Eastern Kentucky Welfare Rights Org.*, 426 U.S. 26, 44 (1976). Taken together, the circumstances of this case render the threat of future injury "conjectural or hypothetical," not "actual and imminent." *Lujan*, 504 U.S. at 560-61.[14]

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[13] The conditions underlying the Board's decisions to continue the integration tiebreaker, as well as the choice patterns that prevented some PICS members from being assigned to their schools of choice, have changed markedly and continue to change with each passing school year. Neither Hale nor Franklin was over-subscribed for the 2006-07 school year. Ballard remained somewhat over-subscribed last year, but the magnitude of demand for that school has diminished markedly, while the popularity of other schools has increased. *See* Opp. Br. 8-9.

[14] *Gratz* v. *Bollinger*, 539 U.S. at 261-62, is an instructive contrast in this regard. There, the plaintiff-class representative had standing to seek injunctive and declaratory relief because after being denied admission through a race-conscious policy he was "able and ready" to apply as a "transfer student," and any future transfer application would have been subject to race-conscious review under the same admissions system in effect when the action was first commenced. *Id.* at 262, 266.

PICS asserts that it has associational standing so long as any of its members have school age children. Article III, however, requires more than a desire to use litigation as a vehicle to vindicate value interests; it requires an " 'injury in fact' " that distinguishes "a person with a direct stake in the outcome of a litigation * * * from a person with a mere interest in the problem." *United States* v. *Students Challenging Regulatory Agency Procedures (SCRAP)*, 412 U.S. 669, 687, 689 n.14 (1973). "[A]n organization's abstract concern with a subject that could be affected by an adjudication does not substitute for the concrete injury required by Art. III." *Simon*, 426 U.S. at 39-40 (holding that organization's self-described purpose is insufficient to establish standing). When an association is seeking injunctive relief, but fails to identify a single current member who would have standing to bring suit of his own accord—like PICS here—the Court should dismiss the case for lack of standing.

"The command to guard jealously and exercise rarely our power to make constitutional pronouncements requires strictest adherence when matters of great national significance are at stake." *Elk Grove Unified Sch. Dist.* v. *Newdow*, 542 U.S. 1, 11 (2004). The Court must refrain from resolving the constitutional questions involved here because PICS lacks standing. *See, e.g., id.* at 11-17; *Kowalski* v. *Tesmer*, 543 U.S. 125, 134 (2004).

II. SEATTLE'S CONSIDERATION OF RACE WAS DESIGNED TO FURTHER COMPELLING INTERESTS.

Strict scrutiny initially requires examination of the purposes that the challenged policy was intended to serve, *United States* v. *Paradise*, 480 U.S. 149, 178 (1987), and asks whether those purposes are "important enough to warrant use of a highly suspect tool." *City of Richmond* v. *J.A. Croson Co.*, 488 U.S. 469, 493 (1989) (plurality

opinion). In *Grutter*, this Court recently reaffirmed the view of Justice Powell in *Regents of Univ. of Cal.* v. *Bakke*, 438 U.S. 265 (1978), that the educational benefits of diversity are sufficiently important to support the consideration of race in the context of selective admissions to higher educational institutions. *Grutter*, 539 U.S. at 325. Here, the Board sought to promote similar but even stronger interests through the race-conscious aspects of its student assignment plan.

The Board sought to achieve three distinct purposes: (1) to promote the educational benefits of diverse school enrollments; (2) to reduce the potentially harmful effects of racial isolation by allowing students the opportunity to opt out of racially isolated schools; and (3) to make sure that racially segregated housing patterns did not prevent non-white students from having equitable access to the most popular over-subscribed schools. The compelling nature of the Board's interests is clearly demonstrated by the evidence in this case, and is also supported by a long series of federal judicial, legislative, and executive actions that have occurred since this Court's landmark decision in *Brown* v. *Board of Educ.*, 347 U.S. 483 (1954).

Although this Court has never specifically held that there is a compelling interest in achieving the benefits of integrated public schools where there has not been a finding of intentional discrimination, it has repeatedly recognized both the importance of eliminating the harmful effects of racially isolated schools, regardless of the reasons that those conditions exist, and school districts' inherent authority to address this problem. This Court stated in *Brown* with respect to segregation that: "The impact is *greater* when it has the sanction of the law * * *." *Brown*, 347 U.S. at 494 (emphasis added). In *Swann* v. *Charlotte-Mecklenburg Bd. of Educ.*, this Court affirmed the power of the federal courts to require mandatory school student assignment remedies based

in part on the inherent power of school authorities to address racial integration in student assignment:

> School authorities are traditionally charged with broad power to formulate and implement educational policy and might well conclude * * * that in order to prepare students to live in a pluralistic society each school should have a prescribed ratio of Negro to white students reflecting the proportion for the district as a whole. [402 U.S. 1, 16 (1971)].

Swann's companion case made explicit that this language was not intended to apply only to situations in which there had been a constitutional violation: "As a matter of educational policy school authorities may well conclude that some kind of racial balance in the schools is desirable quite apart from any constitutional requirements." *North Carolina State Bd. of Educ.* v. *Swann*, 402 U.S. 43, 45 (1971). Similarly, in *Keyes* v. *Sch. Dist. No. 1*, 413 U.S. 189 (1973), Justice Powell expressed concern that the Court's decision might discourage school districts from taking voluntary action to integrate public schools, for fear that such action would constitute an admission of prior purposeful discrimination: "School boards would, of course, be free to develop and initiate further plans to promote school desegregation * * *. Nothing in this opinion is meant to discourage school boards from exceeding minimal constitutional standards in promoting the values of an integrated school experience." *Id.* at 242 (Powell, J., concurring in part and dissenting in part). Later, in *Bustop, Inc.* v. *Board of Educ. of Los Angeles*, 439 U.S. 1380 (1978), then-Justice Rehnquist declined to stay a state court remedy for *de facto* segregated schools, explaining: "While I have the gravest doubts that the Supreme Court of California was *required* by the United States Constitution to take the action that it has taken in this case, I have very little doubt that it

was *permitted* by that Constitution to take such action." *Id.* at 1383 (emphasis in original).

Most significantly, in *Washington v. Seattle*, this Court supported the authority of school boards to voluntarily adopt race-conscious integration measures. While the Court there did not "specifically pass on" the constitutionality of the Seattle Plan, it did invalidate a voter-imposed ban on busing for integration purposes that removed the authority of the school board to eliminate *de facto* school segregation. 458 U.S. at 472-73 and n.15.[15] This ruling was entirely consistent with *Bakke*, decided four years earlier, in which the Court described the principles concerning race-conscious measures that it recently reaffirmed in *Gratz* and *Grutter*.

A. Strict Scrutiny Requires Appropriate Consideration of the Unique Context of Public Education.

In assessing the nature of the Board's three asserted interests, this Court must consider the unique context of public secondary school assignments.[16] "Although all

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[15] While the United States now argues that the District's most recent efforts to promote integrated schools were "patently unconstitutional," U.S. Br. 6, in 1982 with reference to the Seattle Plan, it told this Court that:

> Absent a finding of de jure segregation, decisions concerning the public schools of the State of Washington *lie fully within the prerogative of the state.* * * * This includes the right to make tradeoff choices between the advantages and disadvantages of neighborhood schools on the one hand, and busing on the other. [Brief for United States No. 81-9 at 13 (emphasis added)].

[16] Judge Kozinski, concurring in the judgment below, observed that because student assignment plans are fundamentally different from other race-conscious government programs, strict scrutiny should not apply. Pet. App. 63a. While the District's plan satisfies traditional strict scrutiny standards, the characteristics noted by Judge Kozinski show the many ways in which school assignments differ from other programs previously considered by the Court:

governmental uses of race are subject to strict scrutiny, not all are invalidated by it," and in the application of this standard, "[c]ontext matters." *Grutter*, 539 U.S. at 326-27. "Not every decision influenced by race is equally objectionable and strict scrutiny is designed to provide a framework for carefully examining the importance and the sincerity of the reasons advanced by the governmental decisionmaker for the use of race in that particular context." *Id.* at 327.

In applying strict scrutiny, the Court should give appropriate weight to the judgments of school officials in addressing local issues of educational policy. *See, e.g., Missouri* v. *Jenkins*, 515 U.S. 70, 99 (1995) ("our cases recognize that local autonomy of school districts is a vital national tradition"); *Freeman* v. *Pitts*, 503 U.S. 467, 490 (1992). Courts have long deferred to the professional judgment of school officials regarding matters of educational policy, *see, e.g., Hazelwood Sch. Dist.* v. *Kuhlmeier*, 484 U.S. 260, 273 (1988), including in cases where recalcitrant school officials had engaged in purposeful discrimination. *Dayton Bd. of Educ.* v. *Brinkman*, 433 U.S. 406, 410 (1977); *see also Grutter*, 539 U.S. at 328 ("Our scrutiny of the interest asserted by the Law School is no less strict for taking into account complex educational judgments in an area that lies primarily within the expertise of the university.").[17]

> The Seattle plan certainly is not meant to oppress minorities, nor does it have that effect. No race is turned away from government service or services. The plan does not segregate the races; to the contrary, it seeks to promote integration. There is no attempt to give members of particular races political power based on skin color. There is no competition between the races, and no race is given a preference over another. That a student is denied the school of his choice may be disappointing, but it carries no racial stigma and says nothing at all about that individual's aptitude or ability. [*Id.* at 65a].

[17] The United States argues, without explanation, that deference is not appropriate because the design of an assignment plan "do[es] not reflect the same type of educational judgments at issue in *Grutter*." U.S. Br. 16 n.5. The Government's position in *Johnson* v. *California*, 543 U.S. 499

This Court also should give due deference to the Board's "educational judgment not only in determining that diversity would produce the[ ] benefits [asserted], but also in determining that these benefits were critical to the [Board's] educational mission." Pet. App. 19a (citing *Grutter*, 539 U.S. at 328-33). "[E]ducational policy * * * is [an] area in which this Court's lack of specialized knowledge and experience counsels against premature interference with the informed judgments made at the state and local levels." *San Antonio Indep. Sch. Dist.* v. *Rodriguez*, 411 U.S. 1, 42 (1973); *see also Missouri* v. *Jenkins*, 515 U.S. at 139 (Thomas, J., concurring) ("Usurpation of the traditionally local control over education not only takes the judiciary beyond its proper sphere, it also deprives the States and their elected officials of their constitutional powers. At some point, we must recognize that the judiciary is not ominiscent, and that all problems do not require a remedy of constitutional proportions.").

Local control of public education also serves important state and national interests by promoting " 'experimentation, innovation, and a healthy competition for educational excellence.' " *Milliken* v. *Bradley*, 418 U.S. 717, 742 (1974) (quoting *Rodriguez*, 411 U.S. at 50); *see also United States* v. *Lopez*, 514 U.S. 549, 581 (Kennedy, J., concurring) ("[T]he states may perform their role as laboratories for experimentation to devise various solutions where the best solution is far from clear."). Seattle provides a perfect example of the benefits of such experimentation. "Since the 1960's, while courts around the country ordered intransigent school districts to desegregate, Seattle[ ] * * * voluntarily explored measures to end de facto segregation in the schools and to provide all of the District's students with access to

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(2005), was seemingly to the contrary. *See* U.S. Br. in No. 03-636 at 8 (strict scrutiny "would not preclude prison administrators from using race, * * * or courts from applying appropriate deference to such judgment.").

diverse and equal educational opportunities." Pet. App. 4a. Over this time, Seattle's schools became more integrated and diverse. When the Board was developing the Open Choice plan, it took into account both the progress that had been made and the consequences of applying neighborhood preference to the most popular schools, and "adopted a plan that emphasizes school choice, yet tempers such choice somewhat in order to ensure that the schools reflect the city's population." Pet. App. 66a.

B. Each of the Interests Asserted by the Board Is Compelling.

The Board was motivated by three distinct compelling interests in adopting the integration tiebreaker. Each of these interests reflects the consistent choice made by the people of Seattle, through their elected school board, not to allow segregated housing patterns to dictate the setting in which their children are educated or to create racial inequities in their public school system.

1. Educational Benefits of Racially and Ethnically Diverse Schools.

The Board seeks to provide several different types of educational benefits by promoting racially and ethnically diverse secondary school enrollments: the inculcation of important civic values of tolerance and mutual respect, better teaching and learning for all students, and increased lifetime opportunities. *Grutter* held that enrolling a critical mass of minority students in law school "promotes 'cross-racial understanding,' helps to break down racial stereotypes," and "enables [students] to better understand persons of different races." 539 U.S. at 330. Notwithstanding the efforts of PICS to limit *Grutter's* rationale to admissions to selective institutions of higher education, it is apparent that the educational benefits of racial and ethnic diversity are even stronger in the public school context.

The function of modern public schools extends beyond basic education to include "preparing students for work and citizenship" in our multiracial and multicultural democracy. *Grutter*, 539 U.S. at 331 (citing *Plyler* v. *Doe*, 457 U.S. 202, 221 (1982); *Brown*, 347 U.S. at 493). "[E]ducation * * * is the very foundation of good citizenship," *Brown*, 347 U.S. at 493, and a " 'principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment.' " *Seattle*, 458 U.S. at 472 (quoting *Brown*, 347 U.S. at 493); *see Bethel Sch. Dist. No. 403* v. *Fraser*, 478 U.S. 675, 683 (1986) ("schools must teach by example the shared values of a civilized social order"). The importance of imparting these values in high school is highlighted by the fact that not everyone goes on to college; for a substantial number of Seattle students, "their public high school educational experience will be their *sole* opportunity to reap the benefits of a diverse learning environment." Pet. App. 25a (emphasis in original).[18]

The Board concluded that, in its educational judgment, diversity in the classroom "fosters racial and cultural understanding, which is particularly important in a racially and culturally diverse society such as ours." JA 129. The accuracy of this statement is confirmed by the testimony of the principal of Nathan Hale High School, who explained that, after his school became more diverse, students of different races and backgrounds had more significant interactions—in class and out—and racial tensions and cliques largely disappeared. ER 305. The social science evidence in the record also makes clear that racial diversity in public schools can enhance students' civic values by bringing

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[18] *See Comfort* v. *Lynn Sch. Comm.*, 418 F.3d 1, 15-16 (1st Cir.), *cert. denied*, 126 S. Ct. 798 (2005) ("[T]here [is] significant evidence" supporting the view "that the benefits [to be derived] from a racially diverse school are *more compelling* at younger ages.") (emphasis added).

them together, from an early age, in ways that can reduce racial fears and stereotypes; teach students how to interact comfortably and respectfully with people who are different from them; and prepare them to be good neighbors, colleagues, and citizens in our increasingly pluralistic democracy. Pet. App. 22a-24a; *see* SER 244-47. As the Washington Supreme Court found:

> [T]here is strong empirical evidence that a racially diverse school population provides educational benefits for all students. Most students educated in racially diverse schools demonstrated improved critical thinking skills—the ability to both understand and challenge views which are different from their own. [*Parents Involved in Cmty. Schs.*, 72 P.3d at 162.]

PICS did not contradict this evidence. Instead, its expert testified that "[t]here is general agreement by both experts and the general public that integration is a desirable policy goal mainly for the social benefit of increased information and understanding about the cultural and social differences among various racial and ethnic groups." Pet. App. 22a.

The country's increasing diversity, with the growing need for our Nation's citizens to interact, in business and in life, with citizens of other nations in a global society, have made this value more compelling than ever in the public school context. By attending a racially and ethnically diverse high school, students have the opportunity to learn through experience that a person's race or ethnicity does not equate with any particular character trait or viewpoint. In *Grutter*, this Court noted that diminishing the force of racial stereotypes is "a crucial part of the Law School's mission." 539 U.S. at 333. This lesson is even more valuable at the high school level.

The civic values of mutual respect and tolerance, which are the glue holding the disparate parts of our diverse society together, are inculcated to a large degree in our nation's

elementary and secondary schools. As Judge Kozinski noted, "attitudes and patterns of interaction are developed early in life and, in a multicultural and diverse society such as ours, there is great value in developing the ability to interact successfully with individuals who are very different from oneself. It is important for the individual student, to be sure, but it is also vitally important to us as a society." Pet. App. 67a (Kozinski, J., concurring). Indeed, this "live-and-let-live spirit" is the "essence of the American experience." *Id.*

The Board also sought to pursue a second educational benefit in the form of improved teaching and learning. *Grutter* recognized the learning advantages for all students in having a student body representing diverse viewpoints. 539 U.S. at 329-30. This Court has similarly noted in the high school context that " '[t]he classroom is peculiarly the 'marketplace of ideas.' The Nation's future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth 'out of a multitude of tongues, [rather] than through any kind of authoritative selection.' " *Tinker* v. *Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 512, (1969) (*quoting Keyishian* v. *Board of Regents*, 385 U.S. 589, 603 (1967)). Prior to *Grutter*, the Board likewise concluded that racial and ethnic diversity "brings different viewpoints and experiences to classroom discussions and, thereby enhances the educational process." JA 129. Whether because of the exposure to a multiplicity of ideas or merely as a method of ensuring equal school and community resources, there is also significant evidence that integrated schools can result in increased student achievement, particularly for minority students. *See* SER 172-93, 194-213, 214-21, 222-33, 246, 259 (studies identifying academic benefits of diverse schools).[19]

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[19] Petitioner argues that the "sociological evidence" of the educational benefits of racially and ethnically diverse school enrollments is too "inconclusive and disputed" to support a compelling educational interest.

In order to attain the goal, expressed in *Grutter*, of ending affirmative action in university admissions within 25 years, 539 U.S. at 343, and to meet the requirement of the No Child Left Behind Act that all students achieve at proficient levels by 2013-14 school year, *see* 20 U.S.C. § 6311(b)(2)(F), school districts like Seattle must be allowed to explore a variety of ways to enhance educational opportunities and to close achievement gaps between minority and non-minority students. Student assignment methods that promote integration are one important tool in pursuing this goal.

A third educational benefit sought by the Board in promoting racially and ethnically diverse high school enrollments was to enrich the lives of all students and "open opportunity networks in areas of higher education and employment" for minority students in particular. Pet. App. 23a. The evidence presented below showed that students exiting racially diverse high schools are much more likely to gain employment in integrated work places and admission to integrated colleges. SER 246. Minority students from racially diverse high schools are also more likely to obtain more prestigious jobs at better pay than minority students who are educated in racial isolation. SER 258. Students of all backgrounds also are more likely to live and work in integrated environments and have cross-racial friendships if they have educational experiences in diverse schools. *Id.*

These beneficial effects echo what this Court concluded in *Grutter*, that "it is necessary that the path to leadership be visibly open to talented and qualified individuals of every

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Pet. Br. 36. Its own expert testified, however, both that there is "uniform agreement" that integration causes no negative educational effects and that a choice plan structured to provide access for minority students to better schools could result in academic benefits. SER 409-10. Even if sociological evidence is conflicting, moreover, the issue calls for precisely the type of local education judgment to which this Court properly has shown deference.

race and ethnicity." 539 U.S. at 332. Public schools clearly have a vital role in fostering and promoting these benefits. *See Seattle*, 458 U.S. at 473 ("Attending an ethnically diverse school may help * * * prepar[e] minority children for citizenship in our pluralistic society, while, we may hope, teaching members of the racial majority to live in harmony and mutual respect with children of minority heritage.") (internal quotations and citations omitted).[20]

Despite, or perhaps because of, its failure to produce relevant evidence below, Petitioner now suggests that this Court has already concluded that the benefits of racially diverse schools are too uncertain and that there are "costs" "necessarily" associated with considering race for this purpose that outweigh any benefits. *See* Pet. Br. 35. The Court has found no such thing.[21] To the contrary, this

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[20] Congress has also concluded that voluntary integration and prevention of racial isolation are vital government interests. In reauthorizing the Magnet Schools Assistance Program ("MSAP"), Congress expressly found that it "is in the best interests of the United States":

> (A) to continue the Federal Government's support of * * * local educational agencies that are voluntarily seeking to foster meaningful interaction among students of different racial and ethnic backgrounds, beginning at the earliest stage of such students' education; [and]
>
> (B) to ensure that all students have equitable access to a high quality education that will prepare all students to function well in a * * * highly competitive economy comprised of people from many different racial and ethnic backgrounds. [20 U.S.C. § 7231 (a)(4)].

[21] *Grutter*, 539 U.S. at 328, recognized diversity as a compelling interest. *Shaw* v. *Reno*, 509 U.S. 630, 633-34 (1993), involved racial gerrymandering that segregated voters, while the promotion of integrated public schools is precisely the opposite of this kind of "divvying us up by race." *League of United Latin American Citizens* v. *Perry*, 126 S. Ct. 2594, 2663 (2006) (Roberts, C.J. dissenting). Petitioner's quotation from *Metro Broad.* v. *FCC*, 497 U.S. 547 (1990), states only that strict scrutiny applies to all racial classifications, consistent with the standard applied by the courts below. *Id.* at 603 (O'Connor, J., dissenting).

Court's precedents, consistent with the record below and other social science evidence,[22] fully support the efforts of local officials to seek the important educational benefits result from racially and ethnically diverse enrollments in public schools.

2. Reducing Racial Isolation and Providing the Opportunity to Opt Out of *De Facto* Segregated Schools.

The Board correctly concluded that racial isolation can cause serious educational harms for students. Pet. App. 27a-33a; *see also Brown*, 347 U.S. at 494.[23] Urban school districts face the challenge of racially isolated schools that result not only from state action but also from a complex array of factors including private discrimination, housing availability, suburban migration, and the availability of private school alternatives. The Board had a two-fold goal in attempting to address such harms. Seattle was concerned both with mitigating "racially concentrated enrollment patterns" and ensuring that "no student should be required to attend a racially concentrated school." JA 129-30.

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[22] Citing a single law review article, PICS argues that considering race in student assignment teaches "racial hostility," "demoralization" and "anger." Pet. Br. 35-36 (quoting Peter H. Schuck, *Affirmative Action: Past, Present and Future*, 20 Yale L. & Pol'y Rev. 1, 69 (2002)). But that author's conclusions, which are focused principally on college admissions decisions involving determinations of merit, are completely unsupported by any empirical evidence and, most importantly, are contradicted by the daily experience of educators in Seattle and elsewhere that are reflected in the record.

[23] Social science research, including that in the record below, shows the potential negative educational effects for minority students in racially isolated schools, including lower high school and college completion rates and lower levels of academic achievement. *See* SER 172-233; United States Commission on Civil Rights, 1 *Racial Isolation in the Public Schools* 193 (1967); Report of National Advisory Commission on Civil Disorders 243 (1968).

The United States Department of Education (the "Department"), which is charged with administering the Magnet Schools Assistance Program ("MSAP") established by 20 U.S.C. § 7231, has long acknowledged the compelling nature of reducing racial isolation in public schools. MSAP provides federal grants to local school districts for magnet programs that seek "the elimination, reduction, or prevention of minority group isolation in [public] schools." 20 U.S.C. § 7231(b)(1). The Department has repeatedly published notices stating that the use of race in such programs must be narrowly tailored to achieve this "compelling interest."[24] The Department's website contains a set of "Frequently Asked Questions" regarding MSAP, which states that race may be used a criterion in plans under MSAP, so long as the plan is "narrowly tailored to accomplish the objective of reducing, eliminating, or preventing minority group isolation." *See* http://www.ed.gov/programs/magnet/faqvolplans.html (last visited Oct. 9, 2006).[25]

Petitioner claims that "there is no evidence" of any kind of racial segregation in Seattle. Pet. Br. 31. But every court to address the question has concluded that assigning Seattle students to schools close to their homes would result in "*de*

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[24] *See* 63 Fed. Reg. 8021, 8022 (Feb. 17, 1998); 64 Fed. Reg. 2110, 2110-11 (Jan. 12, 1999); 65 Fed. Reg. 46698, 46699 (July 31, 2000); *see also* 69 Fed. Reg. 4990, 4992 (Feb. 2, 2004) (Notices, Department of Education, Magnet Schools Assistance Program).

[25] The brief for the United States agrees that "[s]chool districts have an unquestioned interest in reducing minority isolation," U.S. Br. 7, but now suggests that this interest will not support race-conscious measures. Two years ago, however, in *Johnson* v. *California*, the Government provided examples of the race-conscious practices of the federal Bureau of Prisons ("BOP") that it believed were consistent with strict scrutiny. It stated that, in addition to preventing *de facto* segregation, reducing violence and better preparing inmates for re-entry into society, BOP's goal in considering race was to "ensure that inmates are provided essential equality of opportunity." U.S. Br. in No. 03-636 at 25.

facto segregated" schools.[26] Moreover, Petitioner acknowledges that two of the District's south end high schools were 90% non-white. *See* Pet. Br. 37 (identifying "Rainier Beach (8% white) and Cleveland (10%) white")). Students attending those schools clearly attended racially isolated or *de facto* segregated schools. *See* 34 C.F.R. § 280.4(b) (defining "minority group isolation" as "a condition in which minority group children constitute more than 50 percent of the enrollment of the school").

As the lower courts recognized, Seattle escaped the threat of litigation and court-ordered desegregation by adopting a voluntary desegregation plan in 1977. Pet. App. 5a-6a. Other school districts did not, and in many instances their liability was premised on actions which reflected and reinforced segregated residential patterns like those found in Seattle. *See, e.g., Keyes,* 413 U.S. 189 (finding system-wide liability based on intentional decisions employing geographic attendance boundaries to maintain segregated schools in one area of school district); *see also Columbus Bd. of Educ.* v. *Penick,* 443 U.S. 449 (1979); *Dayton,* 433 U.S. at 410. School districts like Seattle should not be forced to walk a Constitutional tightrope between potential liability for intentional segregation on the one hand and for intentional integration on the other. To the contrary, there must be some constitutional safe harbor for districts that have voluntarily done what this Court has required of many recalcitrant school districts as a matter of constitutional compulsion.

In 1996, when the Board decided to move away from its "controlled choice" student assignment plan, greater levels of racial isolation in south end schools and loss of diversity in north end schools were predictable. Nevertheless, precisely because the Board was committed to balancing a variety of

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[26] Pet. App. 28a, 132a, 292a; *Seattle Sch. Dist. No. 1,* 473 F. Supp. at 1001.

competing educational interests and evolving community interests, the Board developed a plan that sought to satisfy the demand for more opportunity to attend a school close to home. In doing so, however, the Board wanted to make sure that re-segregation did not occur, and that students living in areas where schools could become racially isolated had an opportunity to opt-out of those schools, if they so desired.

3. Providing All Students with Equitable Access to their Schools of Choice.

Because the majority of Seattle's over-subscribed high schools are located in predominantly white areas, the Board concluded that a high school assignment plan that relied only on geography and parental choice would disproportionately exclude non-white students from their schools of choice. The District's third compelling interest thus was to help "ensure that all students have access to those schools, faculties, course offerings, and resources that will enable them to reach their full potential." JA 129. The record showed that the Board sought to provide non-white students in south Seattle with equitable access to the most popular schools, which they otherwise have been precluded from attending based on distance. *See* JA 115 (plan provides "escape mechanism[]" for south end students); SER 118 (plan "was a system that provided access"); SER 120 (plan provided "ways to have access"); *see also* JA 173, 175. The Board wanted to give all students, regardless of race or ethnicity, a fair shot at attending one of the most popular schools.

This too is a compelling interest expressly acknowledged by the Executive Branch and Congress. The Department's Title VI regulations, which apply to the District as a recipient of federal financial assistance, prohibit actions with a discriminatory effect on participation in educational

programs.[27] In addition, one of the explicit goals of the MSAP is to "help to ensure equal educational opportunities for all students." 20 U.S.C. § 7231(a)(5). In implementing the MSAP, the Department has long sought to ensure that minority and non-minority students had equitable access to magnet programs. *See, e.g.*, 34 C.F.R. §§ 280.1, 280.32. This is the same interest served by Seattle in making sure that residential segregation did not unfairly exclude minorities from the most popular over-subscribed schools.

C. The Board Asserts No Interest in "Racial Balancing."

Petitioner and the United States both fail to directly address the District's actual interests. Instead, they contend that Seattle was not concerned about its three educational goals at all, but rather sought merely to engage in "racial balancing" for its own sake. This argument fails for several reasons.

First, the record makes clear what the Board's actual educational purposes were. The district court found that "[t]here is no evidence, nor [did Petitioner] claim, that the school board adopted the plan for any other reason" than those summarized in the Board Statement. Pet. App. 287a. Such a finding should close the inquiry into what the District's purposes were, because "good faith" is "presumed" absent a "showing to the contrary." *Bakke*, 438 U.S. at 318-19 (opinion of Powell, J.); *see also Grutter*, 539 U.S. at 387-88 (Kennedy, J., dissenting) (relying on *Bakke* to support acceptance of "considered judgment that racial diversity among students can further [university's] educational task,

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[27] *See* 34 C.F.R. § 100.3(b)(2) ("in determining the types of services, * * * or other benefits, or facilities" the recipient may not "utilize criteria * * * *which have the effect* of subjecting individuals to discrimination because of their race, color or national origin"); 34 C.F.R. § 100.3(b)(3) ("[i]n determining the site or location of a facilit[y]" a recipient "may not make selections *with the effect of* * * * subjecting [individuals] to discrimination * * * on the ground of race") (emphasis added).

when supported by empirical evidence"). Here, there is *no* showing of bad faith and there is a firm basis for the Board's educational judgments.

Second, Petitioner's notion that *any* measure designed to promote integration, or what it calls "racial balancing," is "inherently unconstitutional," Pet. Br. 25, finds no support in this Court's cases. Petitioner's argument would necessarily mean that any action (even a facially race-neutral one) taken with the goal of making public schools more racially integrated is inherently unconstitutional, and would potentially invalidate any action that has integration as one of its goals. This argument has no precedent. Indeed, this Court's principal effort in the latter half of the Twentieth Century with regard to public schools was to try to dismantle segregated public schools.[28]

One of the Court's primary measures of the success of this endeavor is to determine whether school enrollments are "racially balanced." In *Freeman* v. *Pitts*, for example, in addressing how the federal courts should measure the success of desegregation plans, this Court explained that "the degree of *racial imbalance* in the school district, that is to say a comparison of the proportion of majority to minority students in individual schools with the proportions of the races in the district as a whole" is the "critical beginning point." 503 U.S. at 474 (emphasis added). As *Freeman* makes clear, the concept of racial balance is appropriate as a measure of

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[28] In *Brown*, the Court did not simply hold, as the United States now suggests, that "intentionally classifying students on the basis of race violates the Equal Protection Clause," U.S. Br. 6 (citing *Brown*, 347 U.S. 483). Rather, what the Court held in *Brown* and its progeny is that "in the field of public education the doctrine of 'separate but equal' has no place. Separate educational facilities are inherently unequal." 347 U.S. at 495. Any notion that the Fourteenth Amendment established some absolute rule of colorblindness is also contrary to its original intent.

whether a school is sufficiently integrated to serve a particular purpose.

It simply is not the case, as Petitioner and the United States seem to suggest, that an otherwise compelling governmental purpose becomes illegitimate *per se* if the race-conscious means used to pursue it involves consideration of numbers. *See* Pet. Br. 17 ("the essence of racial balancing is the mechanical use of quantitative criterion based on race"). This Court made clear in *Swann* that even federal courts, with their limited powers, could order measures that relied on numerical racial goals when a school district itself, which had the power to do so, failed to develop an effective remedial plan. 402 U.S. at 25 (use of 71% – 29% mathematical ratio acceptable, as "a starting point in the process of shaping a remedy").[29] Thus, the use of numbers relating to degrees of racial balance or imbalance in pursuing a constitutional goal plainly is not unconstitutional *per se*.

For Seattle, "racial balance" is clearly not an end in itself but rather a measure of the extent to which the educational goals the plan was designed to foster are likely to be achieved. Seattle's use of race, however, is far more flexible than the court-ordered remedies involved in cases like *Swann* and *Freeman* (and also far more limited than that used in the District's own prior voluntary desegregation plans).

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[29] The United States errs in suggesting that this Court's decision in *Freeman* somehow reflected a change in the Court's longstanding endorsement of numerical measures of the effectiveness of desegregation plans. U.S. Br. 15. *Freeman* addressed the power of the federal courts to order further racial integration, against the considered judgment of local school officials, where segregation was no longer fairly traceable to the prior *de jure* segregated school system. *Freeman* does not address at all the authority of local school districts to consciously pursue more racially integrated public schools as a matter of educational policy, and certainly does not suggest that local school officials would be barred from using the principal tool used by federal courts in this regard.

With respect to the first goal of promoting the educational benefits of diversity, for example, the District considers schools within a plus or minus 15 percentage point range of the district-wide racial composition to have something akin to a "critical mass" of non-minority and minority students that is sufficient to accomplish its goals of inculcating civic values and improving learning. *See Grutter*, 539 U.S. at 308 ("critical mass" defined "by reference to the substantial, important and laudable educational benefits that diversity is designed to produce, including cross-racial understanding and breaking down racial stereotypes").[30]

In sum, neither the United States nor Petitioner presents any serious argument that racially and ethnically integrated schools do not promote compelling educational interests. Instead, their entire discussion of "racial balancing" is a misplaced argument about narrow tailoring. The failure to acknowledge Seattle's actual compelling interests also fatally infects their arguments about narrow tailoring, for it is impossible to assess the closeness of the fit between means and ends without recognizing what those real goals are.

III. THE PLAN WAS NARROWLY TAILORED TO SERVE SEATTLE'S COMPELLING INTERESTS.

The purpose of the narrow tailoring requirement is to ensure that "the means chosen 'fit' * * * th[e] compelling goal so closely that there is little or no possibility that the motive for

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[30] This range also represents an evaluation of the Board's other two compelling interests. With respect to avoiding racial isolation, for example, in the Board's judgment an over-subscribed school that becomes more than 75% non-white is at risk of becoming a racially isolated school. On the other end of the spectrum, a school with less than 45% non-white enrollment offers opportunities for non-white students to transfer from racially isolated schools without undermining the District's other goals. Finally, this range also reflects judgments about the level of interest of white and non-white students in attending popular schools that are not in their neighborhood.

the classification was illegitimate racial prejudice or stereotype." *Grutter*, 539 U.S. at 333 (internal quotation omitted). As this Court has explained, the narrow-tailoring inquiry, therefore, "must be calibrated to fit the distinct issues raised by the use of race" in the particular circumstances. *Id.* at 334. Review of the 2001-02 student assignment plan in light of the District's three compelling interests establishes that the plan was narrowly tailored to advance those interests. Pet. App. 9a, 301a.

A. The Board Determined that Race-Neutral Alternatives Would Not Be Effective.

The District properly considered both whether the use of race was necessary to accomplish its particular compelling interests and whether workable race-neutral alternatives were available. *See Grutter*, 539 U.S. at 339-40; *Paradise*, 480 U.S. at 174-77. The locally elected Board, steeped in the history of Seattle's integration measures, made a careful and realistic judgment about the benefits and burdens of various student assignment plans and determined that for the 2001-02 school year, race-neutral plans could not effectively achieve its three compelling interests and also accommodate its other important educational goals. The District analyzed reasonable methods of achieving its complex educational goals and exercised sound judgment in determining that the limited use of race was necessary to achieve them. This is exactly what narrow tailoring requires. The Board was not required to "exhaust[ ] every conceivable race-neutral alternative" or to "sacrifice all other educational values." *Grutter*, 539 U.S. at 339-40.

In 1996, the Board began to reconsider its student assignment plan, including potentially abandoning consideration of race in student assignments. SER 383.[31] The

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[31] Petitioner's assertion that "[d]istrict officials testified unequivocally that they did not consider using race-neutral alternatives" (Pet. Br. 17) is simply wrong and ignores the actual question put to the superintendent,

Board hoped to adopt a stable, predictable, and cost–effective assignment system with some preference for neighborhood schools. JA 78-79. On the other hand, it also knew that its constituents continued to place a high value on racial diversity and equality of opportunity to attend quality schools. It realized that a choice plan with a neighborhood preference alone was likely to decrease diversity in north end schools, increase racial isolation in some south end schools, and prevent south end minority students from accessing the popular schools in the north. JA 63, 70, 84-86.

After careful consideration, the Board decided to replace the former Controlled Choice plan's race-based assignments with a plan providing greater choices for families and only considering race at all when a school was both over-subscribed and significantly differed from the overall district-wide racial composition. JA 54-55, 63. After initially considering a plan in which integration would have been the first tiebreaker (JA 66-67), the Board designed a system in which race was a far less prominent factor (determining only about 10% of ninth grade assignments in 2000-01, for example). Nevertheless, the plan still fostered more diverse enrollments in the popular schools, allowed students to opt out of racially isolated schools, and provided all interested students, regardless of race, the opportunity to attend at least one of the over-subscribed high schools. JA 36-42, 163.

Petitioner contends that the use of race was unnecessary because, without the use of the integration tiebreaker, there still would have been "significant percentages" of white and non-white students in the over-subscribed high schools. Pet. Br. 14. But at least one of the over-subscribed schools, Franklin, would have been 80% non-white without the plan;

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which was whether consideration was given to a plan that did not have racial balance "as a factor or *goal*." JA 224 (emphasis added). Integrated schools have been a "goal" in Seattle since the 1960's, JA 224, which both race-conscious and race-neutral means have been employed to attain.

a far greater level of minority group isolation than that at which the United States targets MSAP funding. 34 C.F.R. § 280.4(b). More importantly, Petitioner's argument completely ignores the Board's two other goals of allowing students to opt out of racially isolated schools and affording equitable access to popular schools. Without the integration tiebreaker, non-white students at Rainier Beach (92% non-white) and Cleveland (90% non-white) would have had no opportunity to attend a racially and ethnically diverse, popular school.

Petitioner and the United States also object that the plan is not narrowly tailored because it did not do enough for students at those two most racially isolated schools. Pet. Br. 37-38; *see also* U.S. Br. 27. The plan did address these schools, however, by allowing non-white students who would otherwise have been assigned to them to enroll in a more diverse, over-subscribed school. In addition, neither PICS nor the United States identifies any other steps that would address racial isolation in these schools more effectively without involving *more intrusive* race-conscious measures. Narrow tailoring, however, does not require the most aggressive measures possible to serve a single interest. *See Grutter*, 539 U.S. at 340 (narrow tailoring does not require the sacrifice of other important educational goals); *Paradise*, 480 U.S. at 174 n.22 (race-conscious order providing only a "limited" remedy was narrowly tailored where it "balanced several goals, none of which was permitted to dominate at the expense of the others.").

Petitioner acknowledges that even after the initial adoption of the Open Choice plan, the Board continued to consider other "race-neutral" or "less race-driven" alternatives. Pet. Br. 18. Specifically, in 2000, Board members requested the development of two regional high school assignment plans, JA 84-85, 173, ER 403, 405, and considered another form of regional plan proposed by the Urban League. JA 257-59, ER

376-85. The Board ultimately rejected these proposals because: (1) the ability of students to avoid racially isolated schools would have been eliminated; (2) ranking proximity ahead of integration as tiebreakers would have caused the city's segregated housing patterns to be replicated in the schools; and (3) the proposals would have limited parental choice. SER 428-29, 438-39, 443.[32]

The Board also considered substituting poverty for race as a tiebreaker. Pet. App. 53a. The record demonstrates that the Board reasonably concluded that the specific socioeconomic measure proposed for use as a tiebreaker—eligibility for the federal free or reduced price lunch program—was particularly unreliable at the high school level, because many potentially eligible students do not participate. SER 414, 438. In addition, because its interests included advancing racial understanding and tolerance, the Board concluded that substituting economic disadvantage for race would have been an ineffective proxy. Pet. App. 53a. For example, depending on parental choices, low-income white students in the north end could fill all of the over-subscribed north end schools, and eliminate any opportunity for non-white students in the south end to attend those schools.

PICS and the United States also claim that the plan fails narrow tailoring because separate lotteries for seats at each of the over-subscribed schools falling outside of the plus or minus 15 percentage point range would have been an adequate race-neutral alternative. Pet. Br. 18; U.S. Br. 25-27. But no evidence in the record supports this contention.[33]

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[32] Board members viewed the Urban League plan as requiring extensive gerrymandering of attendance zones to achieve schools with comparable racial compositions and as limiting school choice in a manner similar to the Controlled Choice plan that the Board had recently abandoned. SER 426, 438-39.

[33] The lottery theory is premised on the demonstrably incorrect assumption that the racial make-up of the applicant pool of students for each school would approximate Seattle's public school population as a

Such lotteries, moreover, would have meant doing away with the neighborhood preference that in practice dictated most assignments under the Board's plan and was one of its highest priorities; students who lived across the street from a high school could lose the lottery and be assigned elsewhere, a result that could not occur under the Board's plan.

Both PICS and the Government complain, without providing any detail, that Seattle did not make adequate use of magnet schools and other programmatic measures to enhance the popularity of under-subscribed schools. Pet. Br. 18; U.S. Br. 25-27. The Board had implemented such measures. JA 138; ER 407-08. The incremental nature of that process can have negative effects on diversity, however. When Ballard High School reopened with enriched programs, substantial numbers of non-whites (most from the racially isolated south end) selected it as their first choice but it also attracted more nearby white students who previously had chosen to go elsewhere.

Finally, the United States suggests that all problems of racial isolation and unequal educational opportunity, in every one of the thousands of school districts in the nation, can invariably be effectively addressed through race-neutral means. But, just as in *Grutter*, neither Petitioner nor the United States "explain how such plans could work." 539 U.S. at 340. For its sweeping empirical conclusion, the United States cites a report by the Department of Education's Office for Civil Rights ("OCR") that discusses race-neutral plans used by five school districts. U.S. Br. 25. That report, however, contains no information at all about the effectiveness of the race-neutral methods adopted in those districts.

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whole. Pet. App. 55a-56a. The District's experience with choice-based assignment systems, which showed a preference for schools close to home, makes clear that this assumption is inaccurate.

B. Seattle's 2001-02 Plan Considered Race in a Limited Way.

The plan considered race as only one among many factors influencing the school assignment of any child. The first factor affecting every student's assignment under Seattle's plan were the rank-ordered choices made by the student and his or her parents. The second factor was whether the student's requested schools were over-subscribed. The third factor was whether a sibling was already attending a school. In most cases, the next factor (and the most significant factor in assignments to over-subscribed schools, other than choice) was the student's place of residence. The integration tiebreaker applied only when a school both was over-subscribed and had an enrollment outside of a plus-or-minus 15 percentage point range of the overall racial composition of the District's enrollment (between 45% and 75% non-white). This range served the purposes of ensuring that there were adequate opportunities for students of different races to move from racially identifiable schools and to have access to the most popular schools.

Even where the integration tiebreaker applied, race was still subordinated to choice and prior enrollment of a sibling. Under the earlier 2000-01 plan, the integration tiebreaker initially impacted the assignments of only about 300 of approximately 3000 entering ninth grade students.[34] The 2001-02 plan, which used the tiebreaker at only three of the

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[34] Changes in school capacity and movement of other students significantly lowered the number of students who ultimately were affected by the integration tiebreaker. Of the approximately 300 students whose assignments were initially adversely affected by the integration tiebreaker, about 200 were enrolled in one of their schools of choice in the fall of 2000; 93 of these students at one of the over-subscribed schools. JA 162.

ten traditional high schools, had an even smaller impact. JA 40-41, SER 459.[35]

The integration tiebreaker also did not constitute a constitutionally impermissible quota. *Cf.* Pet. Br. 43-44; U.S. Br. 21-22. The Board did not mandate that a fixed number—or indeed any number—of white or non-white students attend any particular school. Rather than dictating the racial composition of schools, the plan merely responded to the popularity of certain schools to prevent them from reflecting Seattle's segregated housing patterns, and to create opportunities for students attending less popular, more racially homogeneous schools. Thus, the plan served to prevent schools that have become racially diverse over the years, from becoming re-segregated, and allowed students at racially isolated schools an opportunity to attend a racially diverse, popular school. The plan did not dictate any quota-like outcomes, as evidenced by the wide range of non-white enrollments in Seattle's over-subscribed high schools, which varied from 40 to 80 percent non-white.

Justice Powell, whose seminal opinion in *Bakke* represents the genesis of the Court's concern with "quotas," recognized the distinction between school integration efforts and other policies that explicitly consider race. As he explained, the circumstances of an applicant denied admission to a selective college are "*wholly dissimilar* to that of a pupil bused from his neighborhood school to a comparable school in another neighborhood in compliance with a desegregation decree," because each student is provided with the opportunity to

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[35] In this way, the plan did not make race the predominant feature in school assignments. *See Miller* v. *Johnson*, 515 U.S. 900, 920 (1995) (determining whether race was "predominant" factor used in drawing voting districts); *Grutter*, 539 U.S. at 338 (plan narrowly tailored where educational institution considered factors other than race in admissions); *see also id.* at 393 (Kennedy, J., dissenting) (noting concern that "race does not become a predominant factor" in the process).

attend a comparable school. *Bakke*, 438 U.S. at 301 n.39 (emphasis added). Justice Powell's separate opinion in *Keyes* makes clear that this dissimilarity depends on the nature of mandatory attendance public schools, rather than the existence of a court desegregation order. 413 U.S. at 242 (Powell, J., concurring in part and dissenting in part).[36] In contrast to selective admissions, hiring, or layoffs, the integration tiebreaker does not "insulate[] [a] category of applicants * * * from competition with all other applicants." *Bakke*, 438 U.S. at 315.

C. The Plan Did Not Unduly Burden Members of Any Racial or Ethnic Group.

The 2001-02 plan also was narrowly tailored because it did not "unduly harm members of any racial group." *Grutter*, 539 U.S. at 341. Under the plan, some students were not assigned to the school of their choice, but no public school student is entitled to assignment at the school of his or her choice. *See* Pet. App. 59a (citing *Parents Involved in Cmty. Schools*, 72 P.3d at 159; *Bazemore* v. *Friday*, 478 U.S. 385, 408 (1986) (White, J., concurring)). In those limited instances where the integration tiebreaker applied, it foreclosed "only one of several opportunities." *Wygant* v. *Jackson Bd. of Educ.*, 476 U.S. 267, 283 (1986).[37] Every student was guaranteed assignment to at least one of the over-

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[36] *Compare Wessmann* v. *Gittens*, 160 F.3d 790 (1st Cir. 1998) (striking down selective high school admissions plan involving consideration of race) *with Comfort* v. *Lynn Sch. Comm.*, 418 F.3d 1 (upholding non-selective race-conscious student assignment plan as narrowly tailored).

[37] In *Wygant*, this Court concluded that race-based layoffs of teachers unduly trammeled their interests by cutting off the income on which they were "heavily dependent * * * for their day-to-day living," and by disrupting settled expectations. 476 U.S. at 283. Race-based hiring decisions, by contrast, were not intolerably burdensome, because they usually foreclosed "only one of several opportunities." *Id.*

subscribed schools, an opportunity that would not have existed under a purely proximity-based assignment plan.[38]

The harm to students here is also limited because there is no indication of merit attached to school assignments: "That a student is denied the school of his choice may be disappointing, but it carries no racial stigma and says nothing at all about that individual's aptitude or ability." Pet. App. 65a (Kozinski, J., concurring). Thus, in the context of voluntarily adopted non-selective school assignments, no student is "deprived of an equal opportunity for education" on account of race. *Bakke*, 438 U.S. at 301 n.39. Every student here had the opportunity to be assigned to a Seattle high school, including one of the over-subscribed schools, and no student was stigmatized as less able or worthy by virtue of being assigned to any particular school. Pet. App. 36a-37a.

And, for those students whose assignments were determined by the integration tiebreaker, there was an appeal mechanism to address special circumstances, ER 135, as well as the substantial possibility of gaining a desired assignment through waitlist movement and school capacity adjustments after initial assignments were made. JA 162.

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[38] Petitioner's description of the "plight" of the Kurfirst and Bachwitz children is in some tension with the facts. It is asserted that these parents—who selected Ballard, Hale, and Roosevelt high schools—wanted their children to attend "a school close to home." Pet. Br. at 7-9. But Hale and Roosevelt are not significantly closer to the Kurfirst and Bachwitz homes than Franklin or Garfield (which those families did not choose) or Ingraham (which they refused to attend), which was ranked in the same category for academic rigor as Ballard, Franklin, and Garfield. JA 142, 151. Petitioner's claim, Pet. Br. 8-9, that school bus service was not available from Queen Anne and Magnolia to Ingraham is incorrect. JA 42; SER 266; *see also* Brose Affidavit at ¶ 3 (filed 8/29/2006). And, although Petitioner argues that the over-subscribed schools are "better" than the other Seattle high schools, Ms. Kurfirst and Ms. Bachwitz offered no plausible explanation of why they had declined even to seek assignment to two of the over-subscribed schools, Franklin and Garfield. ER 452-53, 461.

Petitioner and the United States argue that the plan was flawed because it failed to differentiate between Asian, African-American, Latino, and Native American students, suggesting the Board should have adopted separate standards and tiebreakers for each ethnic group. Pet. Br. 13, 17; U.S. Br. 12-14, 20. This Court's decisions in *Grutter* and *Gratz* suggest to the contrary that the District was correct not to attempt to draw fine distinctions between its various minority communities. *See Gratz*, 539 U.S. at 281 (Thomas, J. concurring) ("[u]nder today's decisions, a university may not racially discriminate between the groups constituting the critical mass"). The record, moreover, shows that no particular racial or ethnic group was disproportionately advantaged or disadvantaged by the single integration tiebreaker. At each of the over-subscribed schools, there was (after application of the tiebreaker) a substantial representation of each of the largest racial and ethnic groups in the city. For example, application of the tiebreaker to Ballard High School in 2000 added 41 Asians, 24 African Americans, 15 Hispanics and four Native Americans to the ninth grade class of 430. JA 309.

D. The Plan Was of Limited Duration.

The plan also was narrowly tailored because it was not designed to be permanent. *See Grutter*, 539 U.S. at 342 (narrow tailoring requires "periodic reviews to determine whether racial preferences are still necessary"). During the years in question, the Board reviewed its assignment practices at least annually and had a demonstrated record of adopting new approaches that diminished attention to race over time.

The plan itself was also self-limiting by design. First, if a high school's enrollment came within the broad 30 percentage point range identified by the District, the tiebreaker would no longer apply. Second, the tiebreaker did not apply to schools that were not over-subscribed. Petitioner

and the United States insist, however, that there *always* will be over-subscribed high schools with racial compositions that fall outside of the guidelines used by the Board. Pet. Br. 46; U.S. Br. 29. This argument, however, rests on a number of empirical assumptions that are demonstrably false. First, it expressly assumes that "housing patterns in Seattle remain constant." U.S. Br. 29. Even Petitioner has acknowledged that housing patterns in Seattle are indeed shifting, albeit slowly, in a way that reduces housing segregation. Pet. Br. 15 n.9, 38 n.7. Indeed, the Board's actions in integrating the city's schools may have contributed to these changes.

In addition, the Board has taken and continues to take important steps to reduce and ultimately end over-subscription at certain schools. For example, it has added a prestigious International Baccalaureate program to Ingraham, attracting to that under-subscribed school students who might in the past have chosen one of the over-subscribed schools. In the 2001-02 school year, a new high school, the Center School, opened close to the Queen Anne and Magnolia neighborhoods, reducing the number of students from those areas seeking assignment to Ballard or other over-subscribed schools.[39] In summary, there is every reason for the Court to acknowledge the Board's consistent efforts to limit the use of race and its intent to eliminate the use of race when such measures are no longer necessary to meet its compelling educational interests. *See Grutter*, 539 U.S. at 343.

E. Individualized, Holistic Review Is Not Required in the Context of Non-Selective Public High School Assignments.

Petitioner and the United States contend that, in order to comport with narrow tailoring, the District was required to transform its student assignment plan into some kind of

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[39] *See* http://www.seattleschools.org/schools/thecenterschool (last visited Oct. 9, 2006).

mini-college admissions processes, presumably requiring comparative evaluation of personal statements, and the like, submitted by eighth-graders who wanted to attend an over-subscribed high school. The Court of Appeals correctly held, however, that such reviews are not an essential feature of a narrowly tailored high school assignment plan where, as here, there was no merit-based competition or consideration of the students' qualifications for assignment and every student received a comparable assignment. Pet. App. 35a-42a.

Petitioner and the United States do not contend that holistic review is required to tailor the assignment plan to the Board's actual purposes. Rather, they urge that individualized comparative review is an absolute requirement for any kind of race-conscious action—regardless of the nature of interests at stake or the "feasibility" of such a review in the particular context. U.S. Br. 20. Under this approach, rather than measuring the "fit" between the asserted goal and the means chosen, the requirement of individualized consideration effectively defines what goals may be pursued.

The United States suggests this limitation was adopted in *Grutter*, U.S. Br. 19, but that decision made no such sweeping ruling. Rather, this Court carefully heeded its own admonition against generalizations without regard to context, stating that its task in *Grutter* was only "to define the contours of the narrow-tailoring inquiry with respect to race-conscious university admissions programs." 539 U.S. at 333. The Court has certainly long been aware of the substantial differences between such selective college or university systems and mandatory-attendance public school assignment plans. *See, e.g., Bakke*, 438 U.S. at 301 n.39. Furthermore, if a requirement of holistic evaluation followed simply from the concept (noted in *Adarand*) that the guarantee of Equal Protection applies to individuals, holistic evaluation would be required for *all* considerations of race, including, for example, court orders remedying *de jure* school segregation

or proven discrimination in employment. Neither the United States nor Petitioner advances that argument, but neither can explain why that rule would not be compelled by their reading of *Adarand*.

PICS and the United States argue that narrow tailoring requires individualized evaluations of detailed applications from each of the 2400 students who applied to an over-subscribed high school. The United States, while making light of the burdens such a system would impose, also readily concedes that no public school system in the nation has ever attempted to assign thousands of students in this manner, U.S. Br. 20, and it is clear that such a requirement would render strict scrutiny of any general school assignment plan, "fatal in fact." *Adarand*, 515 U.S. at 237 (citation and quotation omitted).

CONCLUSION

For the foregoing reasons, the decision of the *en banc* court of appeals should be affirmed or the case dismissed.

Respectfully submitted,

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